Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PETER HELLER

PRO SE PETITIONER

versus

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PETER HELLER
PRO SE PETITIONER

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THE QUESTIONS PRESENTED FOR REVIEW

I

Did the Court's below err in not applying on direct appeal or at trial, an amended Federal Rule of Criminal Procedure, retroactive to petitioner's case, said rule change being announced by the United States Supreme Court 31 days before petitioner's trial, despite mandated, retroactive standards set forth by this court heretofore, thereby denying petitioner equal protection and due process, with others similarly situated?

II

Did the trial judge, in his jury charge, constructively amend the four counts of the indictment, which in turn led to prejudicial jury confusion when, without stipulation, he "specifically instructed" the jury that they should treat all the

conjunctive "ands" as being the disjunctive "or" between other charging words in the indictment, thereby denying petitioner the right to be charged and judged only on the indictment as returned by the grand jury, in violation of petitioner's Fifth and Sixth Amendment right's?

TABLE OF CONTENTS

THE QUESTIONS PRESENTED FOR REVIEW . . . i-ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES . . . . . IV-V

REPORTED CASES 1

STATEMENT OF JURISDICTION 2

STATUES AND FEDERAL RULES 3

STATEMENT OF THE CASE 4

A. PROCEDURAL DISPOSITION 4

B. STATEMENT OF THE FACTS 5,6,7,8

REASONS FOR GRANTING THE WRIT. 9

ISSUE I (ARGUMENT). . 9 . 10 . 11. 12 .13 .14

ISSUE II (ARGUMENT). 15.16

CERTIFIED SIGNATURE OF PETITIONER 17

APPENDIX 18

APPENDIX "A" 19. 20

Table of Authorities

PAGE NO.

CASES

Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed. 2d. (1987 9-11

Hallowell v. Commons, 239 U.S. 506, 36 S.Ct. 202, 60 L.Ed. 409 (1916) 13

Reiter v. Sonotone, 442 U.S. 330, 60 L.Ed. 2d. 931-39 S.Ct. 1038, 1045-47, 8L.Ed. 2d. 240 (1962) 15

Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d. 334 (1989) 14

United States v. Fernandez-Toledo, 749 F.2d. 703, 705(11th Cir. 1985 14

United States v. Menasche, 348 U.S. 528,538-39, 99 L.Ed.615, 75 S.Ct. 513 (1955) . . . 16

United States v. Osser, 864 F.2d 1056 (3rd Cir.1989) 14

United States v. Woods, 986 F.2d 669 (3rd Cir. 1993) 14

STATUES AND RULES

FED. R, CRIM. P. . 16 (A) (1) (E).. 9, 11, 12

FED. R. CRIM. P. . . .702 10

FED. R. CRIM. P. . . .703 10

FED. R. CRIM. P. . . .704 10

18 U.S.C. § 641 (2) 4

28 U.S.C. § 1254 (1). 2-3-5

28 U.S.C. § 1291 (1). 3-5

42 U.S.C. § 408 (A) (3). 4

42 U.S.C. § 408 (A) (3). 4

REPORTED CASES

The District Court's and the Court of Appeals' decisions in this case have not been published.

STATEMENT OF JURISDICTION

The jurisdiction of the Supreme Court was invoked pursuant to 28 U.S.C. § 1254, as an appeal from a final judgment entered on May 19, 1994, by: the United States Court of Appeals for the Third Circuit. A Sur Petition for panel rehearing with suggestion for rehearing In Banc was denied July 7, 1994, an extension of time to file a petition for a writ-of certiorari was extended to December 5, 1994 dated September 30, 1994, on December 7, 1994 petition was returned to petitioner to have corrected copies re-submitted by April 15. 1996.

STATUES AND FEDERAL RULES

28 U.S.C. § 1254. Courts of Appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any civil or criminal case, before or after rendition of judgment or decree,

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require entire record to sent up for decision of the entire matter in controversy.

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

A. Nature of the case

This is an appeal from a final judgment of conviction in the Third Circuit Court of Appeals for the District of New Jersey.

B. Procedural History

On or about February 10, 1993, petitioner was indicted by the federal grand jury for the District of New Jersey for alleged theft of federal monies in violation of 18 U.S.C. § 641 (count 1) ; failure to disclose material information to the Social Security Administration ("SSA") in violation of 42 U.S.C. § (counts two and three); and filing a false statement with SSA in violation of 42 U.S.C. 42 U.S.C. § (count four).

On August 17, 1993, petitioner was sentenced to 18 months in a federal correctional institution.

correctional institution.

Judgment was entered on August 20, 1993. On August 25, 1993, notice of appeal was filed. On September 17, 1993, petitioner surrendered to the Federal Correctional Institution in Springfield, Missouri, to begin serving his sentence.

Jurisdiction is founded upon 28 U.S.C. § 1291 as a pro-se petitioner certifies that is an appeal from a final judgment of conviction entered by the United States District Court for the District of New Jersey. The Third Circuit Court of Appeals jurisdiction is invoked under Title 28, U.S.C. § 1254 (1).

STATEMENT OF FACTS

On April 5, 1985, petitioner filed an application for Disability Benefits with the Social Security Administration stating that I was unable to work due to total kidney failure.

On April 18, 1995, petitioner underwent a kidney transplant at the University of Minnesota Hospital in Minneapolis Minnesota. On June 18, 1995, petitioner at the direction of the SSA, filed an application for benefits on behalf of his two minor children, stating that I could not work.

On August 6, 1995, petitioner and his children were awarded benefits retroactive to January 1985.

In August 1985, petitioner informed SSA that he was returning to employment, although not his regular job as a policeofficer, in September 1985 by completing a SSA form sent to him from the local office of the SSA. In August 1987, petitioner reported to SSA an anticipated change in his full time employment status. Petitioner had planned to take a new full time position with CDS Trucking. It was this disclosure of an anticipated job offer to SSA that formed the

basis for the false statement charge in count four of the indictment.

Shortly after petitioner reported his anticipated new employment with CDS Trucking, he received notice from SSA that he was coming up for his first formal review including a medical examination. In response he completed an SSA form disclosing his full medical and work history since he began receiving disability benefits and hand-delivered it to the Jersey City, New Jersey SSA District office.

Petitioner testified he was told at the time that he would continue receiving benefits for a nine month work period ending in late 1988. At trial the government not only denied that SSA never received this form but further added that petitioner was never eligible for benefits.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for several reasons. This petition presents issues previously resolved by this Court and the opinion below directly conflicts, by implication, with previous decisions of this Court and with decisions of other Circuits.

ISSUE I

That by not applying a Federal Rule of Criminal Procedure 16 (a) (1) (E) retroactively, the petitioner's Constitutional Rights were abridged by both the standard set in Griffith V. Kentucky concerning the retroactive application of new decisions on direct appeal.

ARGUMENT

Rule 16 (a) (1) (E) was announced on April 22, 1993 by this Court 31 days before petitioner's trial. The new rule states as follows:

(E) Expert Witnesses; At the defendants request, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705. of the Federal Rules of Evidence during its chief at trial. This summary must describe the witness's opinions, the basis and the reasons therefor, and the witness's qualifications.

This Court held in Griffith V, Kentucky 479 US 314, 93 L. Ed 2d 649, 107 S Ct 708 (1987) held that, "A new rule for the conduct of criminal prosecutions, such as the ruling in Batson, applies retroactively to all cases, state and federal pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past."

(a) "Failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. After this

Court has announced a new rule in the case selected for review, the integrity of judicial review requires the Court to apply the rule to all similar cases pending on direct review. In addition, selective application of a new rule violates the principle of treating similarly situated defendants the same." (Griffith at page 653) The issue of the application of the rule was brought to the trial court's attention. Because the government's case turned on the expert testimony of office supervisor, Diane Kochanski, this issue was critical in determining if petitioner was denied a fair trial. Before Kochanski testified, counsel for petitioner requested all reports of the government expert including her opinion. The trial court granted in the motion in part requiring reports to be furnished but not summaries of her opinions and therefore violated the newly announced Rule (16) (a) (1) (E). This issue was timely raised on

appeal. The Third Circuit Court of Appeals affirmed without opinion.

It should be further noted that the order implementing new Rule 16(E) provided in paragraph two as follows:

> 2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1993, and shall govern all proceedings in criminal cases thereafter commenced and, in so far as practicable, all proceedings in criminal cases then pending. (Order of April 22, 1993)

Given the propensity of the individual's convicted in jury trials to tale appeals in the event of their conviction, it was certainly reasonably foreseeable that this case would still be pending within the meaning of rule 16's enabling order on December 1, 1993. It is similarly apparent that a written summery of Kochanski's testimony and a copy of her computer report

could have been forwarded to trial counsel had the government been so disposed. as the information was clearly critical to the prosecution of the case. In other words, the information was available and required no special preparation, but the government chose not to share it with trial counsel, exactly the discretionary decision that Rule 16 (E) was modified to prevent. The law is well settled in regards to the application of statuary modifications, which a Rule Amendment clearly is: it requires Congressional approval, to pending cases. In 1916, this Court in Hallowell V. Commons 239 US 506,36 S.Ct 202, 60 L.Ed 409 (1916) held that in changing the tribunal which determined disputes over Indian Rights, that the statutory modification should apply to pending cases, because it "takes away no substantive right" and therefore the litigants had no vested interest that would interfere with the application in pendant

cases. Many Courts have affirmed the general rule that "a new statue should apply to cases pending on the date of its enactment unless a manifest of injustice would result." United States V. Fernandez Toledo 749, F2d 703, 705 (11th Cir. 1985) Other cases directly related to the issue of a new, pending rule are Teague V. Lane 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed 2d 334 (1989) discussion concerning cases on collateral review and appropriate retroactively, "are implicit in the concept of ordered liberty." U.S. V. Woods 986 F2d. 314, 107 S.Ct. 708, 93 L.ed. 2d. 649 (1987) delt with a discussion of the "appropriate standard for retroactively." United States V. Osser 864 F2d. 1056 (3rd Cir. 1989) holding Mc Nally decision retroactively applied).

ISSUE II

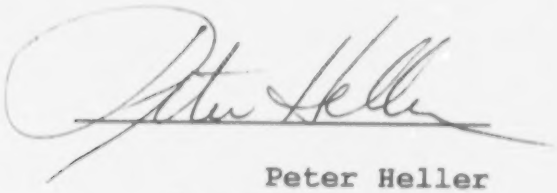
The trial judge constructively amended the indictment when he with stipulation "specifically instructed" the jury to disregard all the conjunctive "ands" as being the "disjunctive "or" between other charging words in the indictment.

In his written and oral instruction to the jury, the trial judge changed the indictment beyond that which he is allowed to correct a typographical error or a matter of form.

By instructing the jury to use the disjunctive in place of the conjunctive, the indictment was not the product that the grand Jury had intended. Further, a leading Supreme Court case directly points to the matter at bar, Reiter V. Sonotone 442, U.S. 330, 60 L.Ed.2d. 931,99 S.Ct. 2326 pg.933, 937 "That strained construction would have us ignore the disjunctive "or" and rob the term property of it's independent and ordinary

significance moreover, it would convert the noun "business" into an adjective. In construing a statue we are obliged to give effect, if possible, to every word Congress used. Further, in United States V. Menasche, 348 U.S. 528, 538-539, 99 L Ed. 615, 75 S Ct. 513 (1955), "Canons of construction ordinarily suggest that the terms connected by a disjunctive be given separate meaning unless the context dictates otherwise." Since the indictment and all four counts of the charges contain "knowingly and willfully" in the charging terms of the indictment, both of which must be proven, a reasonable jury could have found petitioner guilty by believing that he had to find only one of the required terms (elements) as found by the Grand Jury and required by statue on each of the four counts.

All of which is respectfully submitted.



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APPENDIX

Appendix "A" Judgment Order of the Court of Appeals 3rd. Circuit. No. 93-5517

APPENDIX "A"

United States Court of Appeals
For the Third Circuit

No. 93-5517

United States of America

V.

Peter Heller

Appellant

Appeal from the United States District Court
for the District of New Jersey
D.C. Criminal No. 93-00065
(District Judge: Honorable Nicholas
H.Politan)

Argued: May 12, 1994
Before; BECKER, LEWIS, Circuit Judges and
POLLAK, District Judge

JUDGMENT ORDER

After considering the contentions raiseed by the appellant, to wit,

1) the district court erred in permitting the government to prove a case which departed so substantially from the

indictment that it amounted to a impermissible amendment of the indictment or a prejudicial variance from it;

2) appellants conviction should be reversed because the expert's report of Diane Kochanski was not designated as such to the defense, despite a discovery order under rule 16, and because Kochanski was, over objection, improperly permitted to testify beyond the scope of her expertise; and

3) The prosecution's improper references and comments on the failure of the defendant to call a witness was prejudicial to the defendant and was prosecutorial misconduct, mandating reversal, it is

ADJUDGED AND ORDERED that the judgment of the district court entered August 20, 1993, be and is hereby AFFIRMED.

BY THE COURT:

_____
Circuit Judge

Attest:

_____
Bradford Baldwin
Chief Deputy Clerk Dated: May 19, 1994